IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 405 OF 2006

United India Insurance Co.Ltd. .. Petitioner

versus

M/s.Prabhavati Polymers Pvt.Ltd. .. Respondent

...

Mr.Sanjay Jain with Rahul Mehta i/b KMC Legal Venture for the petitioner.

Mr.R.D. Dhanuka with Ms.A.R. Dhanuka for the respondent.

CORAM : D.G. KARNIK,J.

DATED : 18th January 2007.

P.C.:

1. By this petition under section 34 of the Arbitration and Conciliation Act 1996 (for short "The Arbitration Act") the petitioner challenges the unanimous award dated 4th July 2006 passed by the Arbitral Tribunal.

2. The facts giving rise to the dispute are briefly summarised below:-

3. The respondent (hereinafter referred to as "the claimant") took out an insurance cover against fire in respect of its assets and factory situated at Bhiwandi Wada road. The petitioner issued an insurance policy dated 2nd February 2003 covering the factory building, plant and machinery and the stocks. The building was insured in the sum of Rs.11 lakhs, the plant and machinery and the stocks were insured in the sum of Rs.42,72,500/-. Fire broke out on account of a short circuit in the factory on 26th October 2003. The entire factory was gutted in the fire. Immediately thereafter the claimant informed about the fire to the petitioner who appointed M/s.H. Kanan & Co. to carry out the survey on 27th October 2003. The surveyor visited the factory several times and confirmed that the fire was caused by an electric short circuit. After inspection at the site and also of the necessary bills and records, surveyor submitted his interim report on 15th January 2004 estimating the loss at Rs.34,03,552/-. The surveyor

submitted his final report on 13th September 2004 assessing the total loss claimed under the insurance at Rs.45,07,703/-. The petitioner insurance company not being fully satisfied with the report of the surveyor by its letter dated 15th October 2004 called for certain clarifications from the surveyor which were submitted by him by his letter dated 29th November 2004.

4. In the mean while, the claimant after notice to the petitioner re-erected the factory building and had also replaced the plant and machinery and started production in June 2004 or thereabout. After the factory was re-instated by re-erection and purchase of new plant and machinery, for the reasons best known to it the petitioner appointed a second surveyor M/s.Alok Shankar Papu Technocracts Pvt.Ltd. by its letter dated 2nd December 2004. The second surveyor visited the premises on a few occasions. Obviously, he visited the premises after the entire factory was re-instated and renewed and could not have had the first hand knowledge of the state of affairs as they existed immediately after the fire and at any time prior to the re-instatement of the factory. The second surveyor however assessed the

loss at Rs.25,35,897/- and submitted his interim report dated 9th February 2005. Thereafter, he submitted his final report dated 27th June 2005 assessing loss at Rs.26,06,805/-. On the basis of the report of the second surveyor, the petitioner offered to pay to the claimant a sum of Rs.6,03,922/- after taking credit for Rs.20 lakhs which it had already paid by way of interim payment. Being dissatisfied with the amount offered, the claimant requested the petitioner to refer the matter to arbitration in accordance with clause no.13 of the policy of insurance. The matter was accordingly referred to the Arbitral Tribunal consisting of three arbitrators, one appointed by the petitioner, second appointed by the claimant and the third presiding arbitrator appointed by the two arbitrators.

5. The claimant adduced documentary evidence before the Arbitral Tribunal in the shape of original bills, bank statements, letters of the suppliers of the goods/stocks and the machinery. The bills were not disputed by the petitioner either in the written statement or in any other manner before the Arbitral Tribunal. The petitioner filed affidavit of two witnesses viz. its Regional Officer and the

representative of the second surveyor. The Regional officer initially offered himself for the cross examination but after part of the cross examination was over did not attend the further proceedings before the Arbitral Tribunal. The petitioner submitted before the Arbitral Tribunal that it was unable to produce the witness for further cross examination and gave up his testimony. Similarly, the representative second surveyor whose affidavit was submitted also initially offered himself for cross examination but before the cross examination could be completed remained absent for further cross examination and petitioner informed the Arbitral Tribunal that it was giving up his evidence also. Thus no oral evidence was also relied upon by the petitioner.

6. After considering the documentary evidence adduced by the claimant and the surveyor’s reports, the Arbitral Tribunal award holding that the claimant was entitled to Rs.46,50,607/- with interest and costs. After deducting the amount of Rs.26,03,922/- which was already paid by the petitioner, the award declared that the claimant was entitled to the balance principal sum of Rs.20,46,685/- together with

interest and costs of arbitration. Being aggrieved by the unanimous award dated 4th July 2005 of the Arbitral Tribunal, the petitioner has filed this petition under section 34 of the Arbitration Act.

7. Learned counsel for the petitioner firstly submitted that the Arbitral Tribunal erred in law in relying upon the bills and surveyors' reports and in particular the reports of the first surveyor. Counsel submitted that the bills were not proved in accordance with law. Neither the persons who had issued the bill were examined nor had the petitioner examined any other witness to prove the bills. The bills were therefore not proved and should not have been looked into by the Arbitral Tribunal. He further submitted that the first surveyor whose report was relied upon by the Arbitral Tribunal was not examined as a witness by the claimant. The claimant could not have relied upon the report and the Arbitral Tribunal could not have admitted in evidence the report of the first surveyor as the same was not proved. The claimant ought to have examined the first surveyor if he wanted to rely upon the report. He therefore submitted that the award which

is based upon the bills and surveyors report which were not proved is contrary to law and the public policy of law and was required to be set aside under sub-clause (ii) of clause (b) of sub-section(2) of section 34 of the Arbitration Act. Counsel submitted that though the strict rules of evidence under the Indian Evidence Act, 1872 were not applicable broader principles thereof did not apply and the unproved documents could not be relied upon by the Arbitral Tribunal. In support the counsel relied upon the decision of the Supreme Court in Bareily Electric Supply Co.Ltd. Vs. The Workmen reported in AIR 1972 SC 330. Therein the Supreme Court has held that though the technicalities of the Evidence Act are not applicable to the proceedings before the Industrial Tribunal the broader principles contained in the Evidence Act were required to be followed by the Tribunal. In my view, the Arbitral Tribunal is also required to follow the broad principles of Evidence Act as also the principles of natural justice. The procedure laid down under the Arbitration Act as also the procedure which had been agreed between the parties under the arbitration agreement must be followed. Normally, the evidence adduced by a witness of the party, whether by way of an affidavit

or by way of an examination in chief before the Arbitral Tribunal cannot be admitted in evidence unless the witness is offered for the cross examination. In the present case, though affidavit of two witnesses were filed on behalf of the petitioner and they were offered for cross examination, both the witnesses did not stand the brunt of the cross examination. Each of them left half way through and the petitioner declared that it was unable to produce them for further cross examination and therefore their evidence was rightly not relied upon by the Arbitral Tribunal. As regards the bills, the respondent had never doubted either the genuineness of the bills or the contents thereof. The original bills were shown to both the surveyors appointed by the petitioner and also to the petitioner. The original bills were produced before the Arbitral Tribunal. At no stage, petitioner challenged the genuineness of the bills nor did it challenge their contents. The petitioner did not dispute that there was an accidental fire on account of a short circuit. The petitioner did not dispute that the factory, plant and machinery, stocks and raw materials were gutted in the fire. The petitioner did not dispute its liability but the only dispute

was about the quantum. The value of the factory was mentioned in the insurance policy. The value of the plant and machinery was also mentioned and each item was listed in the policy of insurance. The said value was accepted by the petitioner at the time of accepting the insurance proposal. Obviously, this must have been done after the verification of the bills showing the value of the property and the plant and machinery. Thus the value was accepted by petitioner itself at the stage when the insurance proposal was accepted and the correctness of the bills was never disputed even before the Arbitral Tribunal. In the circumstances, in my view, the Arbitral Tribunal committed no error in accepting as evidence undisputed bills produced by the claimant. In this connection, reference may be made to the observations of the Apex Court in paragraph no.14 of its decision in Bareily Electricity Supply Co. Ltd. Vs. Workmen:-

> "But the application of principle of natural justice does not imply what is not evidence can be acted upon. On the other hand what is means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subject to cross-examination by the party against whom they are sought to be used. When a document is produced

> in a court or a tribunal the questions that naturally arise is, is it a genuine document, what are its contents and are the statements contained therein true. When the Appellant produced the balance-sheet and profit and loss account of the company, it does not by its mere production amount to a proof of it or of the truth of the entries therein. If these entries are challenged the Appellant must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with principles of natural justice as also according to the procedure under Order XIX, Civil Procedure Code and the Evidence Act, both of which incorporate these general principles.
> (underlining supplied)

The Supreme Court has held that mere production of a balance sheet and profit and loss account would not amount to its proof or truth of the entries therein. If the entries are challenged and the party must prove each of the entries by producing evidence. In the very sentence (underlined) the Supreme court has clarified that the entries must be proved by evidence when the correctness of the entries is challenged. Applying this principle to the bills, the claimant would have been required to prove the bills if their genuineness or correctness was ever challenged by the

petitioner. In the present case, since neither the genuineness of the bills nor the contents thereof was ever challenged and in fact the price/value states therein was accepted at the time of accepting the proposal of insurance, it was not necessary to examine any witness for proving the bills.

8. As regards the survey report, the surveyor was appointed by the petitioner itself. The survey report was submitted to the petitioner and not to the claimant. The survey report was produced by the petitioner itself. Counsel for the petitioner however submitted that the survey report was not produced by it but was produced by the claimant. I find no merit in this submission. In paragraph no.3.3 of its written statement, the petitioner has stated

> They have also intimated to us vide their letter, dated 26.10.2003. We have appointed H. Kannan & Co., surveyor to do the survey. Mr.H.Kannan, submitted the Final Report. <u>The Final Report is enclosed herewith.</u>
> (underlining supplied)

Thus, the petitioner itself had produced the final survey report along with its written

statement/statement of defence. The claimant was entitled to rely upon any document which was produced by the petitioner and it was not necessary for him to prove the documents produced by the other side viz. the petitioner. Tribunal therefore committed no error in relying upon the first surveyor's report which was produced by the petitioner himself.

9. Learned counsel for the petitioner then submitted that the Tribunal has awarded claim in excess of what was claimed in the claim statement. In particular, he submitted that in the claim statement, claimant had claimed Rs.1,20,000/- for the ribbon blender while the Arbitral Tribunal had awarded the claim of Rs.2,23,346/- for the ribbon blender. Similarly, in respect of the assembled S.S. blender, claimant had made a claim of Rs.4,81,386/- while the Tribunal had awarded the claim of Rs.7,51,396/- therefor. In respect of the S.S. vessels, claimant had made a claim of Rs.6,81,390/- while the claim awarded by the Arbitral Tribunal was Rs.9,39,345/-. With the help of the counsel for the parties, I have gone through the claim statement as well as the claim quantification made in the award. Counsel for the claimant pointed out that the S.S.

vessels, S.S. blenders and ribbon blenders were not bought out items but were assembled. Therefore, the claim was divided into the value of the materials bought, labour charges, m.s.platform materials, pipes, valves and fittings. Item nos.1, 2, 3, 4, and 5 and 12 represent the total claim for ribbon blenders, assembled s.s. blenders and assembled s.s. vessels. Item nos.8, 9, and 10 of schedule of the plant and machinery listed in the insurance policy show that the value of ribbon blender was Rs.3 lakhs, value of s.s. blenders was Rs.8 lakhs and value of s.s. vessels at Rs.10 lakhs. While making the assessment, the surveyor had assessed materials for ribbon blender, s.s. blender and s.s. vessels separately and made a separate claim for labour charges, and assembly of pipes, valves, fittings and m.s. platform. Since the surveyor appointed by the petitioner had followed that method, the claimant had also followed that method while making the claim showing separately claims for materials used for ribbon blender, s.s.blender and s.s. vessels and for labour charges, pipes, valves and fittings and m.s. platform. Thus the difference in the valuation is explained. With this explanation, it cannot be said that the Arbitral Tribunal has awarded amounts excess

of the amount claimed in the claim statement.

10. In my view, the Arbitral Tribunal has given cogent reasons for awarding the claim. The Arbitral Tribunal consisted of 3 persons who were experts in the insurance field. It did not contain any person with legal background. Such Arbitral Tribunal is not expected to write awards like a judicial officer writing a judgement. What is required to be seen is whether the award is a reasoned award and gives sufficient reasons for the conclusions reached. In my view, the Arbitral Tribunal has given sufficient reasons for the award and there is neither an error apparent on the face of the record nor is it shown that the award is contrary to law or is in conflict with any public policy of India.

11. For these reasons, in my view, there is no merit in the petition which is hereby dismissed with costs.

D.G. KARNIK, J